



United States Department of the Interior

FISH AND WILDLIFE SERVICE



Post Office Box 1306
Albuquerque, New Mexico 87103

In Reply Refer To:
FWS/R2/ES/FOIA
FWS-2019-00066
FWS-2019-00124

Mr. Jimmy Tobias
MuckRock News
DEPT MR 62319
411A Highland Ave
Somerville, Massachusetts 02144-2516

Dear Mr. Tobias:

This responds to your Freedom of Information Act (FOIA) requests dated October 13, 2018, and November 6, 2018, in which you requested the following:

“Any and all written or electronic communications, including attachment, sent or received by Clay Nichols regarding the lesser prairie chicken's species status assessment. Any and all briefing materials generated by FWS Region 2 regarding the lesser prairie chicken's species status assessment. This request also seeks any recommendations made by Region 2 to Fish and Wildlife Service or Interior Department headquarters concerning the Endangered Species Act status of the lesser prairie chicken. This request seeks documents generated in the last six months.”

“Any and all written or electronic communications, including email attachments and text messages, sent or received by Clay Nichols (clay_nichols@fws.gov) regarding the ESA status of the lesser prairie chicken. This request also seeks Mr. Nichol's communications concerning the lesser prairie chicken's species status assessment, or SSA. This request seeks records produced between May 1, 2018 and the date this request is processed.”

Your FOIA requests were assigned tracking number FWS-2019-00066 and 2019-00124 and forwarded to the Arlington Ecological Services Field Office for processing. The searches conducted for the above requests resulted in the same set of responsive records thus, we are providing one response to both of your requests.

Staff located 152 records responsive to your request. From these, a portion of one record is partially redacted, and 114 records, are being withheld in full pursuant to FOIA Exemption (b)(5), as described below. The full release and partially redacted material are provided to you with this letter. Thirty-seven records are contained in a single Portable Document Format (PDF) portfolio.

Pursuant to the attorney-client privilege of Exemption (b)(5), we are withholding three records in full or in part. Under Exemption 5, agencies may withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency” (5 U.S.C. § 552 (b)(5)). As such, Exemption 5 “exempt[s] those documents normally privileged in the civil discovery context.” National Labor Relations Bd. v. Sears Roebuck & Co., 421 U.S. 132 (1975). This exemption incorporates several disclosure privileges contained in the civil discovery context, including the attorney-client privilege. The attorney-client privilege protects confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice and is not limited to the context of litigation. Moreover, although it fundamentally applies to confidential facts divulged by a client to his/her attorney, this privilege also encompasses any opinions given by an attorney to his/her client based upon, and thus reflecting, those facts, as well as communications between attorneys that reflect confidential client-supplied information.

The information that has been withheld under the attorney-client privilege of Exemption 5 constitutes confidential communications between the U.S. Fish and Wildlife Service’s (Service) attorney and Service employees seeking professional legal assistance and services. It also encompasses opinions given by the Service’s attorney to employees based on employee-supplied facts and legal advice and comments on draft documents. The Service’s employees who communicated with the attorney regarding this information were clients of the attorney at the time the information was generated and the attorney was acting in his capacity as a lawyer at the time they communicated legal advice. Finally, the Service has held this information confidential and has not waived the attorney-client privilege.

Under the deliberative process privilege of Exemption 5, 112 records have been withheld that are both predecisional and deliberative. They do not contain or represent formal or informal agency policies or decisions. They are the result of frank and open discussions among employees of the Department of the Interior. Their contents have been held confidential by all parties and public dissemination of these drafts would have a chilling effect on the agency’s deliberative processes; expose the agency’s decision-making process in such a way as to discourage candid discussion within the agency, and thereby undermine its ability to perform its mandated functions.

The deliberative process privilege protects the decision-making process of government agencies and encourages the frank exchange of ideas on legal or policy matters by ensuring agencies are not forced to operate in a fish bowl. A number of policy purposes have been attributed to the deliberative process privilege. Among the most important are to: (1) assure that subordinates will feel free to provide the decision maker with their uninhibited opinions and recommendations; (2) protect against premature disclosure of proposed policies; and (3) protect against confusing the issues and misleading the public.

The deliberative process privilege protects materials that are both predecisional and deliberative. The privilege covers records that reflect the give-and-take of the consultative process and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.

We reasonably foresee that disclosure would harm an interest protected by one or more of the nine exemptions to the FOIA's general rule of disclosure.

Some of the documents we are releasing (i.e. draft and/or final briefing papers, draft talking points and/or discussions among staff offering suggestions and/or discussing potential courses of action, etc.), technically meet the requirements to be withheld under the deliberative process privilege of FOIA Exemption 5 (5 U.S.C. §552(b)(5)); however, after consulting with our legal counsel, and carefully considering the parties involved, we believe there is no harm in releasing this information and no other exemptions apply, i.e. there are no institutional, commercial, and/or personal privacy interests at risk with the release of these documents. Therefore, we are releasing these documents to you in full as discretionary release. Please note, that in exercising administrative discretion, the Service does not waive its ability to invoke applicable FOIA exemptions for any arguably similar information in future requests.

This response to your FOIA request was made in consultation with Frank Lupo, Attorney-Advisor, Office of the Solicitor, Southwest Region, U.S. Department of the Interior (Department). You may appeal this response to the Department's FOIA/Privacy Act Appeals Officer no later than 90 workdays from the date of this letter. Appeals arriving or delivered after 5 p.m. Eastern Time, Monday through Friday, will be deemed received on the next workday. Your appeal must be made in writing. You may submit your appeal and accompanying materials to the FOIA/Privacy Act Appeals Officer by mail, courier service, fax, or email. All communications concerning your appeal should be clearly marked with the words: "FREEDOM OF INFORMATION APPEAL." You must include an explanation of why you believe the Service's response is in error. You must also include with your appeal copies of all correspondence between you and the Service concerning your FOIA request, including your original FOIA request and the Service's response. Failure to include with your appeal all correspondence between you and the Service will result in the Department's rejection of your appeal, unless the FOIA/Privacy Act Appeals Officer determines (in the FOIA/Privacy Act Appeals Officer's sole discretion) that good cause exists to accept the defective appeal.

Please include your name and daytime telephone number (or the name and telephone number of an appropriate contact), email address and fax number (if available) in case the FOIA/Privacy Act Appeals Officer needs additional information or clarification of your appeal.

DOI FOIA/Privacy Act Appeals Office
Department of the Interior, Office of the Solicitor
1849 C Street, N.W.
MS-6556 MIB
Washington, D.C. 20240
Telephone: 202-208-5339 / Fax: 202-208-6677
Email: FOIA.Appeals@sol.doi.gov

Also, please note the 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation and does not affect the timing of filing an appeal with the Department's FOIA & Privacy Act Appeals Officer. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road - OGIS
College Park, MD 20740-6001
E-mail: ogis@nara.gov, Web: <https://ogis.archives.gov>
Telephone: 202-741-5770 / Fax: 202-741-5769 / Toll-free: 1-877-684-6448

You also may seek dispute resolution services from our FOIA Public Liaison, Cathy Willis at 720-732-6687 or via email at cathy_willis@fws.gov.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010)). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

This completes the Southwest Region's response. The fees incurred in responding to your request have been waived in accordance with 43 C.F.R. §2.37. If you have any questions or concerns regarding this request, please contact Government Information Specialist, David Tischer, at 505-248-6658 or by email at fw2foia@fws.gov.

Sincerely,

Melanie Ruiz
Region 2 FOIA Coordinator